IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1154 of 1998

For Approval and Signature:

HONOURABLE MR.JUSTICE J.M.PANCHAL
AND
HONOURABLE MR.JUSTICE H.B.ANTANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment?

2 To be referred to the Reporter or not?

3 Whether Their Lordships wish to see the fair copy of the judgment?

4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder?

5 Whether it is to be circulated to the Civil Judge?

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STATE OF GUJARAT - Appellant

Versus

SHANTIDEVI W/O RAMESHWARPRASAD MAHENDRA KUSHAVAH & OTHERS - Opponents

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Appearance :
MR ND GOHIL, ADDITIONAL PUBLIC PROSECUTOR for the Appellant.
MR RAJESH M AGRAWAL for Opponents : 1 - 2.
UNSERVED-EXPIRED (N) for Opponent : 3
MR JB PARDIWALA for Opponent : 4,

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CORAM : HONOURABLE MR.JUSTICE J.M.PANCHAL
and
HONOURABLE MR.JUSTICE H.B.ANTANI

Date : 27/10/2005

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE J.M.PANCHAL)

1. Instant appeal, filed under Section 378 of the Code of Criminal Procedure, 1973, is directed against judgment

dated October 12, 1998 rendered by the learned Special Judge, District: Kutch, Bhuj, in Special Case No. 115 of 1997 by which the respondents are acquitted of the offences punishable under Sections 20 (b) (i) and 20 (b) (ii) read with Section 29 of the Narcotic and Psychotropic Substances Act, 1985 (*"the Act"*, for short).

2. The facts emerging from the record of the case are as under:

On June 17, 1997, Mr. M. A. Pagi was discharging duties as Senior Police Sub-Inspector of Gandhidham Police Station. At about 20-40 Hours, he received a wireless message from Bhuj Taluka that CR No. 1/97 for commission of offence punishable under Section 20 (b) and 29, etc. of the Act were registered against two persons i.e. Rameshwarsingh Mahendraprasad and Laxman Motiram residing at *Dhobi Ghat*, Navi Sundarpuri, Gandhidham, as they were found in possession of 4.940 Kilograms of *charas* and as there was possibility of find of more quantity of *charas* from their house, appropriate steps should be taken to search their house. On receipt of abovereferredto wireless message, Senior PSI Mr. Pagi

made necessary entry in Station Diary maintained at the Police Station and summoned two *panch-witnesses*. He forwarded report to his immediate official superior, as required by Section 42 (2) of the Act and drew first part of panchnama at the Police Station itself. Thereafter, the members of the raiding party, including *panch-witnesses*, reached *Dhobi Ghat* area. It may be stated that *Dhobi Ghat* is a slum area wherein several slum quarters have been constructed and people are residing therein. The houses of Rameshwar Singh Mahendraprasad and Laxman Motiram were shown by Councillor of Gandhidham Municipality Mr. Vashist Tiwari. After members of the raiding party reached the house of Rameshwarprasad, Mr. Vashist Tiwari called out name of wife of Rameshwarprasad. Thereupon, Ms. Shantidevi i.e. respondent No. 1 came out of her house. She was informed about the wireless message received from Bhuj Taluka Police Station and told that it was necessary to search her person and her house. Before effecting search, Senior PSI Mr. Pagi offered the respondent No. 1 to be searched in presence of a Magistrate or a Gazetted Officer, but the said offer was declined by her. Thereupon, search of house of respondent No. 1 was made. From the store-room of the house, a polythene bag

containing rectangular black substance was found, which was *prima facie* ascertained to be *charas*. In order to weigh the said substance, Soni Tribhuvan Babulal was summoned. He weighed the substance and its weight was found to be 1 Kg. On the wall, which was north to store-room, a sealed polythene bag was found hanging. On opening the same, it was found to be containing leaves and flowery topes of *ganja*. That substance was also weighed by Soni Tribhuvan and its weighted was found to be 450 Grams. Out of the offending substances found, 4 samples, each of 20 Grams, were drawn and sealed, as required by law. From the house of respondent No. 1, one steal plate mentioning name of owner of the house i.e. her husband was seized. On demand, the respondent No. 1 could not produce pass or permit authorising her to possess *charas* and *ganja*. Therefore, she was arrested. Thereafter, Senior PSI Mr. Pagi along with members of police staff and the respondent No. 1 as well as muddamal seized from the house of respondent No. 1, went to the house of Laxman Motiram, which was pointed out by Mr. Vashist Tiwari, who was then Councillor of Gandhidham Municipality. After reaching near the house of Laxman Motiram, name of wife was called out and thereupon, Bhanuben had come out. Search of house of Laxman Motiram

did not yield find of any contraband item. After completing second part of panchnama, Senior PSI Mr. Pagi with others returned to Gandhidham Police Station. He lodged his complaint on behalf of State at about 5.15 Hours on June 18, 1997. After registration of offences, complaint lodged by Senior PSI Mr. Pagi was handed-over to him for further investigation. During the investigation, it transpired that the respondent No. 1 and her husband had brought the quantity of *charas* from Nepal and that the original accused No. 3 i.e. Laxman Motiram had assisted the respondent No. 2 in selling the said quantity. The investigation also revealed that the respondent No. 4 had handed-over *ganja* to respondent No. 2. The samples drawn were sent to Forensic Science Laboratory (FSL) for analysis. The report of the analysis indicated that the samples analysed were *charas* and *ganja* within the meaning of the Act. Senior PSI Mr. Pagi recorded statements of those persons who were found to be conversant with the facts of the case. After investigation was over, he chargesheeted the four accused in the Court of learned Special Judge, Kutch, District: Bhuj, for commission of offences punishable under the Act, on the basis of which, Special Case No. 115 of 1997 was registered.

3. The learned Special Judge, Kutch, District: Bhuj, framed necessary charge against the respondents at Exh. 10. It was read-over and explained to them. They pleaded not guilty to the same and claimed to be tried. The prosecution, therefore, examined: (i) Govindbhai Maganbhai as PW 1, at Exh. 18; (ii) Govind Nanji Darji as PW 2, at Exh. 39; (iii) Vashistnarayan Ramji Tiwari as PW 3, at Exh. 42; (iv) Muljibhai Dahyabhai as PW 4, at Exh. 43; (v) Parbat Velji Pargdu as PW 5, at Exh. 45; (vi) Kanji Budhabhai Maheshwari as PW 6, at Exh. 47; (vii) Mohansinh Kalusinh as PW 7, at Exh. 50; (viii) Bhupendra Hiralal Joshi as PW 8, at Exh. 51; (ix) Tribhuvan Babulal Soni as PW 9, at Exh. 53; (x) Investigating Officer Mathursinh Ajmersinh Pagi, at Exh. 54; and (xi) Vijaykumar Arjansinh Rathod as PW 11, at Exh. 62 to prove its case against the respondents. The prosecution also produced documentary evidence, which is referred to in detail in the impugned judgment.

4. After recording of evidence of prosecution witnesses was over, the learned Special Judge explained to the respondents the circumstances appearing against them in the evidence of prosecution witnesses and recorded their

further statements, as required by Section 313 of the Code of Criminal Procedure, 1973. In their further statements, each respondent claimed that he / she was innocent. However, no defence evidence was adduced.

5. On the basis of evidence adduced by the prosecution, the learned Judge has disbelieved the case of the prosecution and acquitted the respondents by judgment dated October 12, 1998, giving rise to instant appeal.

6. It may be stated that during the pendency and final disposal of instant appeal, respondent No. 3 i.e. Laxman Motiram Ramchandani expired and, therefore, the appeal against him has been treated as having abated vide order dated June 9, 2000.

7. This Court has heard Mr. N.D. Gohil, learned Additional Public Prosecutor for the State as well as Mr. R. M. Agrawal, learned Counsel of the respondent Nos. 1 and 2 and Mr. J. B. Pardiwala, learned Counsel of respondent No. 4, at length and in great detail. This Court has also undertaken a complete and comprehensive appreciation of all vital features of the case as well as the entire evidence on record with reference to broad and

reasonable probabilities of the case.

8. On reappreciation of evidence, this Court finds that Senior PSI Mr. Pagi could not state firmly in his deposition satisfactorily that he had made report to his immediate official superior, as required by Section 42 (2) of the Act. No documentary evidence could be produced indicating that report, as contemplated by Section 42 (2) of the Act, was forwarded by Senior PSI Mr. Pagi to his immediate official superior. The finding recorded by the learned Special Judge that provisions of Section 42 (2) of the Act were not complied with could not be demonstrated to be erroneous. The Supreme Court has, in a catena of decisions, ruled that provisions of Section 42 (2) of the Act are mandatory and non-compliance of the same would raise serious doubt about search of building and find of contraband substance therefrom. Further, the record shows that house of Rameshwar Mahendraprasad and Laxman Motiram were searched between sunset and sunrise. Though it is mentioned by Senior PSI Mr. Pagi in Exhs. 56 and 58 that there was possibility of affording opportunity for the concealment of evidence or facility for the escape of offender, he could not produce any material on the basis of which he had come to the said conclusion. His reason to believe so

could not be demonstrated to be based on relevant material placed before him. It is relevant to notice that house of the respondent No. 1 was searched after about 8 hours of receipt of information from Bhuj Police Station. Delay in search of house of respondent No. 1 is not explained at all. Therefore, search of house of the respondent No. 1 between sunset and sunrise was illegal. There is no manner of doubt that *proviso* to Section 42 (1) of the Act was not complied with by Senior PSI Mr. Pagi before effecting search of houses of those two accused, who were arrested at Bhuj. The record further shows that the person of respondent No. 1 was searched and at that time, no lady Constable was present. Section 50 (4) of the Act provides that no female shall be searched by anyone excepting a female. The learned Special Judge has recorded convincing reasons for coming to the conclusion that provisions of Section 50 (4) of the Act were committed breach of by Senior PSI Mr. Pagi. Those reasons are to be found in paragraph 24 of the impugned judgment. The record shows that no attempt worth the name was made by Senior PSI Mr. Pagi to secure services of independent *panch-witnesses*. The record shows that the *panch-witnesses*, who were selected, had bad antecedents and were persons who were prosecuted on more than one occasion. Further, it could not be

satisfactorily established by the prosecution that house, which was searched, belonged to Rameshwarprasad. As observed earlier, the house of Rameshwarprasad is situated in a slum area. Though the area falls within the jurisdiction of Municipality, no evidence could be adduced by the prosecution to indicate as to what was its Census Number. Though an attempt was made by Senior PSI Mr. Pagi to produce Voters List to indicate that the respondent Nos. 1 and 2 were in possession of house, which was searched by him, the same is not produced on record of the case. Thus, it is not satisfactorily established that the respondent Nos. 1 and 2 were in possession of house from which offending substances were found. As rightly observed by the learned Judge of the Trial Court, no evidence worth the name could be adduced by the prosecution that the original accused No. 3 against whom instant appeal is treated as having abated, had assisted the original accused Nos. 2 in sale of *charas* or that the original accused NO. 4 had supplied *ganja* to the respondent No. 2. This Court has scrutinised the grounds of acquittal of the respondents, which are recorded in paragraphs 11 to 25 of the impugned judgment and those reasons could not be demonstrated to be erroneous.

9. This is an acquittal appeal in which the Court would be slow to interfere with the order of acquittal. Infirmities in the prosecution case go to the root of the matter and strike a vital blow on the prosecution case. In such a case, it would not be safe to set aside the order of acquittal, more particularly when the evidence has not inspired confidence of the learned Judge who had the opportunity to observe demeanour of the witnesses. As this Court is in general agreement with the view expressed by the learned Judge, the Court does not think it necessary either to reiterate the evidence of prosecution witnesses or to restate the reasons for acquittal given by the learned Judge and this Court is of the opinion that expression of general agreement with the view taken by the learned Judge would be sufficient in the facts of the case. This is so in view of the decisions rendered by the Supreme Court in the cases of (1) **Girija Nandini Devi & Others Vs. Bijendra Narain Chaudhari, AIR 1967 SC 1124**, and (2) **State of Karnataka Vs. Hema Reddy and Another, AIR 1981 SC 1417**.

10. For the foregoing reasons, the appeal fails and is dismissed. Muddamal be disposed of in terms of directions given by the learned Judge of the Trial Court

in the impugned judgment.

[J. M. PANCHAL, J.]

[H. B. ANTANI, J.]

/shamnath